No. 12209

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FREDA MARY VOKAL, CHARLES DAVISON, and ROMEYN B. SAMMONS, Executors of the Estate of Paul F. Vokal, deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

R. B. SAMMONS,
FRANK C. SHOEMAKER,
5975 South Broadway, Los Angeles 3,
Attorneys for Appellants.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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BRIEF FOR APPELLANTS.

Jurisdiction.

This is an appeal from a summary judgment of the District Court of the United States for the Southern District of California, Central Division, entered on December 20, 1948, finding that a certain Renegotiation Agreement executed by the appellants' testator, Paul F. Vokal, deceased, and the plaintiff, is valid and enforceable; that appellants have no right to the recovery of moneys withheld by appellee thereunder, and that appellants be restrained from further prosecuting certain civil suits pending in the Superior Court of Los Angeles County, State of California, for the recovery of moneys from their debtors previously ordered withheld by appellee. The District Court

rendered judgment on Findings of Fact and Conclusions of Law.

Appellants' testator, and his defendant wife, resided at the time of the filing of the action, and continuously resided thereafter to the date of his death, within the jurisdiction of the District Court.

The District Court's jurisdiction rested on Section 41 (1) of Title 28 of the United States Code, and on Section 400 of Title 28, United States Code (now Sections 1331, 1345 and 2201 of Title 28 of the United States Code, entitled "Judicial Code and Judiciary") (Act of June 28, 1948, Chapter 646, Public Law 773, 80th Congress, Second Session).

And this Court has jurisdiction of this appeal under Sections 1291 and 1292(1), Chapter 83, Title 28 of United States Code, entitled "Judicial Code and Judiciary."

Statutes Involved.

The Renegotiation Act of 1943, being Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 (Public 528, 77th Congress) approved April 28, 1942; and as amended in full by Section 701(b) of the Revenue Act of 1943 (Public 235, 78th Congress), enacted February 25, 1944; 50 U. S. C. A. Section 1491.

And more particularly Sections 403(i) (1) (D); 403 (c)(6); 403(c)(4); 403(e)(1); 403(a)(4)(A); 403(a) (4)(B); 403(c)(2); 403(a)(9); 403(C)(1) and 403 (C)(3);

Chapters 1 and 2 E of the Internal Revenue Code; and

Section 101(6) of the Internal Revenue Code;

Renegotiations Regulations Section 381.4;

Subsection 1, Section 8 of Article I of the Constitution of the United States;

Sections 1 and 2 of Article III of the Constitution of the United States;

Section 3806(a) Internal Revenue Code.

All of the above statutes are set forth in the appendix.

Government Rules and Regulations Involved.

Rules governing agents and Price Adjustment Sections of War Contracts Price Adjustment Board. [R. p. 27.]

"Government Contracts and Adjustments. Judge Advocate General's School Text No. 12-219-Ann Arbor, Michigan." [R. p. 27.]

Page 389(d) "Contractors subject to renegotiation. Any contractor, including a prime contractor or a subcontractor, receiving or accruing amounts from contracts with certain Government departments or agencies (or from subcontracts thereunder, or both) in an aggregate amount of $500,000 or more during a fiscal year ending subsequent to 30 June 1943 is subject to renegotiation under the 1943 Act. . . . The contractor's net receipts or accruals after renegotiation may not be reduced below the minimum sum of $500,000. . . ."

P. 392(h) "Receipts from or accruals under a contract containing a renegotiation clause are not subject to renegotiation if the contractor did not receive or accrue the requisite $500,000."

P. 395 (d)(1) "The unilateral determination is limited to excessive profits contained in the total amounts received or accrued from renegotiable contracts during the fiscal year. . . ."

P. 398(f) "Treatment of federal income tax in renegotiation. . . . If the contractor filed its federal income tax return prior to the recapture of excessive profits, the contractor is given a credit against the amount of excessive profits to be refunded equal to the difference between the income tax which it actually paid for the period involved and the income tax for which it would have been liable had the profits to be recaptured not been included in its reported income when the return was filed."

P. 403(4) "Notwithstanding any other provision of the Act all costs allowable as deductions or exclusions under Chapters 1 and 2 E of the Internal Revenue Code, excluding taxes measured by income, are allowable as costs in renegotiation."

Note Below: "(91. Chapters 1 and 2 E, Internal Revenue Code, provide principally for deductions of normal business expenses.)"

P. 404 "The last named principle requires the allowance of any cost which is deductible for income tax purposes under the Internal Revenue Code. If it is impracticable to determine during renegotiation whether any cost is allowable" provision may be made for contingent allowance until it is determined by the Internal Revenue Bureau.

Renegotiation Regulations issued by War Contracts Price Adjustment Board for the year *1943,* provide in Section *381.4* as follows: (Also reported in Vol. 2, Commerce Clearing House, p. 21,051 under "Goverment Contracts Reports" §30,141.) [R. 27.]

After the amount of renegotiable business of a contractor has been determined, it becomes necessary to determine the costs properly chargeable against the business

so as to ascertain the amount of profits derived therefrom. Section 403(a)(4)(B) (See Appendix A, p. 1) of the Renegotiation Act of 1943 defines "profits" as "the excess of the amount received or accrued . . . over the costs paid or incurred with respect thereto. . . ." The same section provides that "all items estimated to be allowable as deductions and exclusions under Chapters 1 and 2 E of the Internal Revenue Code (excluding taxes measured by income) shall, to the extent allocable to such contracts and subcontracts . . . be allowed as items of cost. . . ."

The method of accounting employed in determining the net income of a contractor or subcontractor for federal income tax purposes will be deemed the method of accounting used by him in keeping his books, unless the contractor or subcontractor and the Department conducting . . . agree upon some other method of accounting. The costs paid or incurred with respect to renegotiable contracts will be the costs allocated to such contracts by the contractors' cost accounting method if that method reflects recognized accounting principles and practice; otherwise costs will be determined in accordance with such method as in the opinion of the War Contracts Price Adjustment Board properly reflects such costs.

No item of cost allocable to renegotiable business will be allowed in an amount greater or less than that which is estimated to be deductible or excludible from income under Chapters 1 and 2 E of the Internal Revenue Code. In making such estimates due consideration will be given to any pertinent action by the Bureau of Internal Revenue, but such action need not be regarded as conclusive. Except in a few special cases when it is impossible for the

renegotiating agency to make a reasonable estimate as to whether a particular item of cost is allowable as a deduction or exclusion under the Internal Revenue Code, the estimate of the renegotiating agency will be final for the purposes of renegotiation. [R. p. 27.]

Statement of Case.

PROCEEDINGS.

On December 19, 1944, a Renegotiation Agreement, for the refund of $38,442.26 of alleged excessive profits received by appellants' testator said Paul F. Vokal during the fiscal year 1943, was entered into by said Vokal and his wife with appellee. [R. pp. 9-15.]

On or about June 27, 1945, appellee's agents computed a tax credit under Section 3806 of the Internal Revenue Code of $13,001.22 which appellee credited on said claim of alleged excessive profits. [R. pp. 4, 20.]

On or about July 13, 1945, in response to demands of appellee said Vokal paid $11,136 to appellee under written protest. [R. p. 16.]

On October 5, 1945, pursuant to Section 403(c)(1) of said Renegotiation Act of 1943, appellants demanded, and, on or about October 23, 1945, they received, from appellee's agents their statement of "the facts and reasons" for the determinations made by said War Contracts Price Adjustment Board as to the amount of alleged excessive profits received by appellants' testator in 1943, which statement set forth the Board's method of arriving at said alleged profits. [R. p. 27.]

That appellants' testator, said Vokal, was a subcontractor, within the intent and purview of said Renegotia-

tion Act of 1943 [R. pp. 7, 17] as to some of his operations.

On November 15, 1945, appellee's agents issued withholding orders under Section 403(e)(2)(C) of the 1943 Renegotiation Act to Garrett Corporation and to California Institute of Technology, customers and debtors of said Vokal, which eventually resulted in withholding from appellant's testator Vokal sums aggregating $11,899.04. [R. pp. 5-6, 16.]

On May 5, 1946, further withholding orders to Douglas Aircraft Company, Inc., resulted in withholding from said Vokal the sum of $2,763.79; the total so withheld aggregating $14,662.83, which added to the amount paid on account makes a total of $25,798.83 collected by appellee from said Vokal. [R. pp. 6, 16.]

On December 22, 1945, said Vokal filed action numbered 508,756 in the Superior Court of Los Angeles County, California, to recover from Garrett Corporation the sum so withheld as aforesaid. [R. pp. 7, 29.]

On February 1, 1946, said Vokal filed action numbered 510,156 in the Superior Court of said County to recover from California Institute of Technology the sum so withheld as aforesaid. [R. pp. 7, 29.]

That counsel for appellee appeared as attorneys of record for said defendants Garrett Corporation and Douglas Aircraft Company, Inc., and filed demurrers to the complaints therein, which were on November 21, 1946, overruled. Thereafter said counsel filed answers therein, and said actions are now pending. [R. pp. 8, 29.]

On December 2, 1946, appellee brought the action in said United States District Court, resulting in the sum-

mary judgment from which this appeal is taken. [R. p. 2.] The issues involved in the last mentioned action were the same as those involved in said actions now pending in said Superior Court of Los Angeles County.

On December 20, 1948, the District Court granted Summary Judgment. [R. pp. 40-42.]

FACTS:

Appellee drafted said Renegotiation Agreement of December 19, 1944, and submitted the same to appellants' testator and his wife for execution by them. In the proceedings leading up to such execution, and in the actual contents and recitals therein contained appellee made false statements and representations to appellants' testator for the purpose of inducing him to enter into and execute said agreement. [R. pp. 17-22.]

That in truth and in fact appellee had no jurisdiction over appellants' testator in the matters incorporated in said agreement, nor was he in any wise subject to or within the scope of said Renegotiation Act of 1943. [R. pp. 22-23, 24, 19, 20.]

That appellee misrepresented the facts to appellants' testator and thereby induced him to execute said agreement in the following particulars [R. pp. 17-22]:

(Appellants' testator and his said wife will hereafter be termed "appellants.")

That appellee arbitrarily increased appellants' net income for the year 1943 from $108,184.18 to $156,055.55, an increase of $47,871.37. This was an increase of $47,671.37 in excess of the sum found by the Treasury Department's audit for said year. [R. pp. 19, 23.]

This arbitrary increase was accomplished in the following manner:

Appellants were entitled to the credit for and deductions from their gross receipts of the sum of $22,888.88 disbursed by them during the year 1943 as and for ordinary and necessary expenses of the business and allowed by the Treasury Department, but which appellee denied to appellants in computing their profits. [R. pp. 19, 23.]

Appellee arbitrarily added the sum of $45,162.58 to the gross sales by including certain work in process of appellants' for the year 1943, even though such work in process represented items of certain unfinished and uncompleted contracts, none of which was payable to or collectible by appellants, and none of which had accrued during said year 1943. [R. pp. 19, 23, 24.]

Appellee disallowed the amount of $38,799.04 as the appellants' beginning inventory and added said amount to appellants' net income. [R. pp. 19, 23.]

That the net result of the foregoing adjustments made by appellee was to arbitrarily add to appellants' net income said sum of $47,871.37, in excess of the amount found and determined by the Income Tax Bureau of the Treasury Department. [R. pp. 19, 23, 27.]

Appellee in computing offsetting tax credits allowable under Section 3806(b) of the Internal Revenue Code used an entirely different method and basis from that followed by the Bureau of Internal Revenue in computing appellants' income tax liabilities. [R. p. 20.]

Appellee included contracts and transactions had by appellants with the California Institute of Technology, which by the provisions of Section 403(i)(1)(D) of said Renegotiation Act of 1943 were exempt from renegotiation and should not have been included in appellants' gross or net income. [R. pp. 20, 24.]

Appellee computed and charged appellants with gross sales and receipts subject to renegotiation of $538,442. [R. pp. 15, 18, 23, 20.] That the correct and true amount thereof after deducting $65,576.50 of nonrenegotiable transactions therefrom, was only $472,865.50, and appellants were in consequence exempt from all renegotiation in virtue of Section 403(c)(6) of said Renegotiation Act of 1943, and were not subject to the terms of said Act or to the jurisdiction of the War Contracts Price Adjustment Board. That subdivision (B) of said section explicitly excluded "the aggregate of the amounts received or accrued in such fiscal year by the . . . subcontractor and all persons under the control of . . . subcontractor, under contract with the Departments . . ." that did not exceed $500,000. Appellee erroneously and incorrectly included the sum of $65,576.50 which were in no wise subject to or within the purview of said Act. [R. p. 20.]

That appellee knew at the time of the execution of said agreement, or was charged with such knowledge, that appellants were exempt from renegotiation by the very terms of said Act. [R. pp. 17, 18, 22.]

The Summary Judgment of the District Court.

The Court adjudged:

A. That the Renegotiation Agreement dated December 19, 1944, for the refund of excessive profits is valid and enforceable.

B. That appellants have no interest in any amount withheld by the Garrett Corporation, California Institute of Technology, and Douglas Aircraft Company, Inc., pursuant to said withholding orders directed to said corporations by appellee.

C. That appellants have no right to the recovery by suit or otherwise to any of the amounts so withheld.

D. That appellants be restrained from further prosecuting the following suits in the Superior Court of Los Angeles County; Paul F. Vokal, plaintiff; California Institute of Technology, defendant; No. 510156; and Paul F. Vokal, plaintiff v. Garrett Corporation, defendant; No. 508756. [R. pp. 40-42.]

The District Court's Findings of Fact and Conclusions of Law.

Findings of Fact.

The Court found that there is no genuine issue of any material fact and that appellee is entitled to a summary judgment as a matter of law.

That the allegations set forth in paragraphs I, II, III, V, VI, VII and VIII of appellee's amended complaint were true.

That the tax credit to which appellants were entitled under Section 3806 of the Internal Revenue Code was $13,001.22.

That appellants' testator failed to file in the Tax Court of the United States any petition for redetermination of the amount of excessive profits permitted by Section 403 (e)(1) of the Renegotiation Act (50 U. S. C. (App.), Sec. 1191(e)(1)).

That appellants have not pleaded or offered to prove any fraud or malfeasance or wilful misrepresentation inducing the execution of the contract.

That the first, third, fifth and sixth defenses alleged in the amended answer of the appellants to appellees amended complaint were insufficient as a matter of law and were thereby stricken upon the Court's own motion pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

That the second and fourth defenses present cross-claims against the United States, each of which was for a sum in excess of $10,000, on which the appellee had not consented to be sued in said Court, and that Court accordingly had no jurisdiction to render judgment on such cross-claim.

That all of the allegations set forth in appellants' amended answer inconsistent with the Findings of Fact were untrue. [R. pp. 36-38.]

Conclusions of Law.

That there exists no genuine issue as to any material fact involved in determining the right of recovery, and appellee was therefore entitled to judgment as prayed as a matter of law. [R. p. 39.]

Specification of Errors.

The District Court erred:

1. In its finding that there is no genuine issue as to any material fact, and that appellee was entitled to a summary judgment as a matter of law.

2. That each and all of the allegations set forth in paragraph VI of appellee's amended complaint are true.

3. That the tax credit to which appellants are entitled under Section 3806 of the Internal Revenue Code is limited to $13,001.22.

4. That appellants' failure to file a petition in the Tax Court of the United States for redetermination of amount of alleged excessive profits pursuant to Section 403(e)(1) of the Renegotiation Act of 1943 (50 U. S. C. (App.) (e)(1)) was material, and the implied finding that appellants were in any wise bound to file such petition, or could have filed such petition in the circumstances in which appellants were placed.

5. That appellants did not plead or offer to prove fraud or malfeasance or wilful misrepresentation inducing the execution of the contract mentioned in appellee's complaint.

6. In striking the first, third, fifth and sixth defenses alleged in appellants' amended answer as insufficient as a matter of law.

7. That the District Court had no jurisdiction to render judgment for appellants on the second and fourth defenses set forth in the amended answer.

8. That each and all of the allegations set forth in appellants' amended answer inconsistent with the Findings of Fact were untrue.

In its conclusions of law:

1. That there exists no genuine issue as to any material fact involved in determining the right of recovery in this cause.

2. That appellee was entitled to judgment as prayed as matter of law.

In its judgment:

A. That said Renegotiation Agreement is valid and enforceable.

B. That appellants have no interest in any amount withheld by its said debtors pursuant to said withholding orders directed thereto by appellee's agents.

C. That appellants have no right to the recovery by suit or otherwise to any of the amounts so withheld.

D. That appellants be restrained from further prosecuting said actions in the Superior Court against their testator's debtors numbered 510156 and 508756. [R. pp. 32-34, 52-55.]

Points to Be Argued and Summary of Argument.

The appellee found its action and its claim to recovery on the Agreement of December 19, 1944, executed by the War Contracts Price Adjustment Board acting for appellee, and by appellants' testator and his wife. [R. pp. 9-15.] The authority to execute, and the terms of this agreement are wholly governed by the Renegotiation Act of 1943 (50 U. S. C. A. Section 1491 *et seq.*)

1. The power and jurisdiction of the War Contracts Price Adjustment Board was expressly limited by said Act to the *subject matter* of profits "received or accrued" "from contracts with the Departments and subcontracts which are determined in accordance with this section to be excessive" (Sec. 403(a)(4)(A)) (see Appendix A, p. 1), when derived *from contracts in excess of $500,000 for the fiscal year 1943* (Sec. 403(c)(6)(B)) (see Appendix A, p. 4). The Board's jurisdiction of the *subject matter* could not be given or enlarged by the Board's assumption of power not conferred by statute, nor could the appellants waive such absence of jurisdiction of the subject matter by the execution of said agreement. Appellants contend the circumstances were such that the Board was without power or authority to execute such agreement, and that consequently the same is void and of no effect.

The authority of the Board was limited to and conditioned on:

(1) Profits received or accrued from contracts or subcontracts with the Departments of the Government, and

(2) To contracts in the aggregate exceeding $500,000 for such fiscal year 1943.

The appellants alleged and are prepared to prove that the aggregate of such contracts for such year 1943 was less than $472,865.50. That therefore the Board was without power or authority to execute said agreement, and appellee was consequently totally devoid of any right or power to take or withhold the money of these appellants, and that the same is now withheld without such right.

2. That said agreement is founded on false statements of facts and is void, in that it includes in appellants' receipts and income large sums of money not received or accrued by appellants, and omits and rejects legitimate, proper and necessary deductions for large sums paid for labor and materials during 1943.

That the recitals contained in said agreement are false and untrue in the following respects, to-wit:

a. The Board included in said agreement and in appellants' income certain work-in-process accounts amounting to $45,162.58 which were contingent as to recovery, to which appellants had no unqualified and unconditional right to invoice or recover, were not amounts, income or profits received or accrued, were no part of the subject matter thereof. [R. p. 19.]

b. All transactions of appellants with the California Institute of Technology were exempt from renegotiation by the mandate of Section 403(i)(1)(D) of said statute of 1943, and 101(6) of the Internal Revenue Code. [R. p. 20; see Appendix C p. 9.]

c. The Board violated Section 403(a)(4)(B) of said statute and exceeded its jurisdiction when it arbitrarily denied appellants the right to deduct from their gross receipts the sum of $22,888.88 which represented moneys

paid out in 1943 for ordinary and necessary expenses of the business. [R. pp. 19, 20, 21.]

d. The Board arbitrarily deducted $39,799.04 from appellants' beginning inventory and added the same to appellants' net income. [R. pp. 19, 20.]

e. The Board arbitrarily set up $38,442.26, the entire excess over the $500,000 statutory exemption as excessive profits. [R. pp. 22, 23, 24.]

3. The unjust withholding of appellants' moneys amounted to fraud on appellants' rights, irrespective of whether there was actual fraud, or malfeasance as defined in Section 403(c)(4) of said Renegotiation Act of 1943. (See Appendix A p. 3.) (*Bull v. United States,* 295 U. S. 247, at page 260.)

4. Appellants contend that the District Court was in error when it restrained them from prosecuting said actions in the Superior Court of Los Angeles County against their debtors, for the reason that in the case of *Aircraft & Diesel Corporation v. Hirsch,* 331 U. S. 752, at page 775, the court held, that a suit by a subcontractor against the contractor was the proper remedy, and was not forbidden, either expressly or impliedly, by the Renegotiation Acts, nor were they dependent upon completion of the Tax Court proceedings, and that the contractor was expressly indemnified against such claims by Section 403(c)(2) of the 1943 Act. That the contractor stood as a stakeholder between the Government and the subcontractor.

POINT ONE.

The District Court Was in Error in Rendering Summary Judgment Against Defendants for the Reason That the Answer and Amended Answer Raised Several Genuine and Material Issues of Fact. A Summary Judgment Should Not Be Sustained Unless the Party's Right to Such Judgment Is Clear and There Is No Doubt as to the Solution of Any Essential Question. A Summary Judgment Was Not Intended to Function in a Case Which Is Involved or Complicated.

Doehler v. United States, 149 F. 2d 130 (2d Cir.), was an appeal from summary judgment. Reversed. At page 135(5, 6) the court said:

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial *where there is the slightest doubt as to the facts* and a denial of the right is reviewable; but refusal to grant a summary judgment is not reviewable. . . . But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. (Cf. Arens v. United States, 322 U. S. 419, 429, 433.) The District Courts would do well to note that time has often been lost by reversals of summary judgments improperly entered. Sartor v. Arkansas National Gas Corp., 321 U. S. 620." (Cases cited. Emphasis added.)

Drittel v. Friedman, 60 Fed. Supp. 999 (affd. 154 F. 2d 653).

P. 1003, held that defendants by their answer raised issues which could only be settled by a trial, citing *Doehler v. U. S.,* 149 F. 2d 130, *supra.*

Gonzales v. Tuttman (N .Y.), 59 Fed. Supp. 858, 861 (4), court held that the burden of establishing that no material issue of fact is present on the motion for summary judgment rests on the moving party.

P. 861(5) on a motion for summary judgment every doubt should be resolved against the moving party.

Toebelman v. Missouri-Kansas Pipe Line, 130 F. 2d 1016.

The moving party having failed to sustain its burden and hence a material issue of fact being present the motion for summary judgment must be denied.

American Optical Co. v. New Jersey Optical Co., 58 Fed. Supp. 601, 606(7-9), holds that Rule 56 Federal Rules Civil Procedure authorizes the court to enter summary judgment only if it appears that there is no general issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Under this rule the court's function is not to decide such factual issues, but to determine whether there is an issue of fact to be tried.

All doubts as to the existence of such issues are to be resolved against the moving party.

Fishman v. Teter (7 Cir.), 133 F. 2d 222:

A motion for summary judgment is not to be taken as a convenient substitute for a trial on the merits.

To the same effect is:

Barker v. Hoey, 33 Fed. Supp. 789, 801.

Tobleman v. Missouri-Kansas Pipe Line, 130 F. 2d 1016, holds that the court must look beyond the pleadings and determine whether there is a genuine issue of fact to be tried. To same effect is:

Griffith v. William Penn Broadcasting Co., 4 F. R. D. 475, 477(5, 6, 7);

Hawkins v. Frick-Reid Supply Corp., 154 F. 2d 88, 89(6).

Avrick v. Rockmont, 155 F. 2d 568, 571(5):

It is not the purpose of the rule to deprive litigants of their right to a full hearing on the merits if any real issue of fact is tendered.

Sartor v. Arkansas Natural Gas Corp., 321 U. S. 627;

Phoenix Hardware Co. v. Paragon Paint Corp., 1 F. R. D. 116, 118(4).

Lincoln Electric Co. v. Knox, 56 Fed. Supp. 308:

Action against Secretary of the Navy to enjoin enforcement of Renegotiation Act in its form prior to amendment of February 25, 1944, on ground that Act was unconstitutional. Motion by defendants for summary judgment denied.

Defendants contended that the court lacked jurisdiction because action was in legal effect against the United States, and that plaintiff had available adequate legal and administrative remedies.

Held that the injunction sought would simply prevent an officer of the United States from acting under an unconstitutional statute, if so found. Suit was not against the United States. *Ex parte Young,* 209 U. S. 123; *Philadelphia v. Stimson,* 223 U. S. 605; *Thompson v. Deal,* 92 F. 2d 478; *Ickes v. Fox,* 300 U. S. 82; *Power Co. v. T. V. A.,* 306 U. S. 118; *Lane v. Watts,* 234 U. S. 525; *Franklin v. Tugwell,* 85 F. 2d 208.

Id. p. 310. Plaintiff contended that Act as applied to the facts was void as being repugnant to Art. I, Sec. I, and Art. I, Sec. 8, and to Fifth and Tenth Amendments.

> "Defendants contended that plaintiff had no other recourse than to challenge the claimed right of the government in the Tax Court or in the Court of Claims. We think this is not sufficient. In our opinion the case should be tried on the merits and plaintiff given the opportunity of proving its case, and the question of the constitutionality of the Act of Congress should be briefed and argued. *The rule for summary judgment was, in our opinion, never intended to throw upon the court the burden of determining a case involving, on the one hand, a delicate question of law and, on the other, complicated and controverted facts, without an adequate and proper hearing* . . . clearly plaintiff ought not to be stopped at the threshold of the court and told to seek relief in some other court and in some manner obviously inadequate and incomplete." (Emphasis added.)

United States v. Charles (D. C. N. Y.), 1 F. R. D. 121:

Action by United States for determination of title to land. Motion for summary judgment denied, holding that there were genuine issues regarding facts material to the dispute.

Kent v. Hanlin, 30 Fed. Supp. 836, 837, holds that if answer raises a material issue of fact there is an insurmountable obstacle in the way of a summary judgment. Motion denied.

Tuolumne Gold Dredging Corp. v. Johnson (Cal. N. D.), 61 Fed. Supp. 62, 63: 1(1) Holds plaintiff is entitled to its day in court. It should have a trial so that judgment can be entered on the merits. Motion for summary judgment denied.

Parmelee v. Chicago Eye Shield Co., 157 F. 2d 582, 585(1-3):

Holds that Rule 56 Federal Rules Civil Procedure contemplates an inquiry in advance of trial as to whether there is a genuine issue and may be invoked for the purpose of striking sham claims and defenses. It can not be so applied as to deprive a litigant of his right to try any genuine issue by jury or otherwise. *Whitaker v. Coleman,* 115 F. 2d 305. *If the pleadings raise a genuine issue of fact, material to the dispute, a summary judgment* should not be entered. (*Nickelson v. Nestles Milk Products Corp.* (5 Cir.), 107 F. 2d 17.)

Id. p. 585(4, 5.) The Court should determine what material facts are in issue and what are not, and proceed with the trial as to facts actually in dispute.

The burden of proof is on moving party. *Walling v. Fairmont Creamery Co.* (8 Cir.), 139 F. 2d 318.

Id. p. 586(6, 7.) *Determination of defendants' demand by counterclaim in plaintiff's action rather than by independent action is favored.*

Id. p. 587(9, 10):

". . . The procedure is generally considered as a drastic remedy and strict compliance with the provions of the rule is required. *A number of the District Courts have held that the existence of a counterclaim which presents a real issue prevents the granting of motion for summary judgment.* Standard Rolling Mills v. National Mineral Co., D. C. N. Y., 2 F. R. D. 236; Bolmer v. United States, D. C. N. Y., 26 Fed. Supp. 769. In the instant case, defendant denied that he was indebted to the plaintiff in any amount whatever, and alleged that by reason of the counterclaims defendant was entitled to recover of the plaintiff an amount far in excess of plaintiff's demand. This tendered an issue of fact. Before the adoption of the Federal Rules of Procedure a number of states had provisions for summary judgment, notably New York, Michigan, Illinois, and Connecticut. In New York it has been held that where a counter-claim is properly presented a summary judgment on plaintiff's claim may not be granted since the right to counterclaim is a substantial right which is to be protected. Aetna Life Insurance Co. v. National Dry Dock & Repair Co., 230 App. Div. 486, 245 N. Y. Sup. 365; Bank of U. S. v. Slifka, 148 Misc. 60, 264 N. Y. Sup. 204." (Emphasis added.)

Snouer v. United States, 140 F. 2d 367:

Page 369(1):

"Rule 56(c) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, provides that a motion for summary judgment shall be granted only if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law. Here, the complaint alleged that plaintiff had borne the burden of the taxes in question. This allegation was specifically denied by defendant's answer. Thus there is an issue of fact. That this fact was material can not be denied inasmuch as the statute—section 902 of the Revenue Act of 1936, 1947, 7 U. S. C. A. section 644—makes it a condition precedent to a refund that the claimant establish that he bore the burden of the tax. Because there was such an issue of fact presented by the pleadings, the motion for summary judgment should have been denied."

Plaintiff argued that the burden of taxes had been admitted.

Id. p. 371. Held, that it was clear the plaintiff's motion for summary judgment should not have been granted for the reason that the pleadings presented a material issue of fact. Reversed.

United States v. Kehoe (D. C. Penn.), 4 F. R. D. 306, 307, was a suit by the United States for the collection of taxes assessed by Commissioner of Internal Revenue. Defendant filed answer and plaintiff filed motion for summary judgment.

Page 307(2). Held, that United States was not entitled to summary judgment in suit for collection of taxes, where application of bar of statute of limitations to facts involved and liability of some of the other persons named in assessment presented substantial questions of fact. (3) "Courts should be reluctant to summarily preclude a defendant from a proper determination of the issues where any uncertainty of fact exists." Motion denied.

Purity Cheese Co. v. Ryser Co., 153 F. 2d 88, 89;

In considering a motion for summary judgment, the pleadings on which motion is based are to be liberally construed in favor of the party opposing the motion. Rules Civil Procedure, sec. 56(c). Federal Rules Civil Procedure 89(1, 2.) *Motion for summary judgment should be sustained only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law.*

In *State of Washington v. Maricopa County* (9 Cir.), 143 F. 2d 871, motion for summary judgment granted in District Court was reversed on appeal. Held, there were some genuine issues as to material facts.

Schenley Distributors v. Wisconsin Import Corporation, 28 Fed. Supp. 635, 637, involved motion for summary judgment. Held it must be denied where a genuine and substantial issue of fact is presented by the pleadings. *United States v. Curtis,* 147 F. 2d 639.

United States v. Clark (1947—D. C. Oregon), 72 Fed. Supp. 393, 394:

Suit involved renegotiation acts.

Page 394. Court holds War Contract Price Adjustment Board's Regulations are not binding on the courts.

> "I have been struck by the type of legislation Congress adopted to recover excessive profits.
>
> (4) "The War Contracts Price Adjustment Board makes a unilateral determination of the amount due as excessive profits and demands immediate payment. This is followed by suit in the District Court, to which

the contractor may not make a defense. He may not defend, because the Tax Court has been given exclusive jurisdiction to try his case *de novo*. The Tax Court's decision is final and not reviewable. Going into the Tax Court does not stay the case in the District Court. That case passes judgment summarily.

(5) "This is another variation of Yakus doctrine. Yakus v. United States, 321 U. S. 414. The power we in this country call 'the Government' can require the courts, state and federal, to reduce its claims to judgment and thereafter enforce them, without defenses being allowed.

"Why serve summons in this type of cases? What need is there to notify a defendant who cannot defend?

"How long this travesty of the judicial process is going to continue appears uncertain. The Supreme Court is plainly having difficulties with the statute, Aircraft & Diesel Equipment Corporation v. Hirsch, 67 S. Ct. 1493 (*supra*). The justice who wrote the opinion in the case wrote the dissenting opinion in the Yakus case. The fundamental questions arising under the two statutes are the same. The state courts have already resisted being used as vessels to pour things into."

In *Lincoln Electric Co. v. Knox,* 56 Fed. Supp. 368, involving one of the Renegotiation Acts, court denied defendant's motion for summary judgment.

Franklin v. Tugwell, 85 F. 2d 308.

POINT TWO.

The District Court Was in Error in Its Judgment Restraining the Appellants From Further Prosecuting the Two Suits in the Superior Court of Los Angeles County, Numbered 510,156 and 508,756 Respectively, Against Their Contractors.

Both of these actions were brought long prior to the bringing of the action at bar, and under the authority of *Aircraft & Diesel Corporation v. Hirsch,* 331 U. S. 752, appellants as subcontractors pursued the proper procedure to obtain a judicial determination of all the issues presented by the pleadings.

At page 775 of the *Aircraft* case, *supra,* Justice Rutledge, speaking for the court, said:

> "In the first place, there can be no doubt of the availability or indeed the certainty and effectiveness of appellant's remedy at law upon its contracts against its customers claimed to owe it money under these agreements. Suits of that character are not forbidden, either expressly or impliedly by the Renegotiation Acts. Nor are they made dependent upon completion of the Tax Court proceedings. (*Cf.* American Federation of Labor v. Watson, 327 U. S. 582, 589, . . .) Moreover we know of no reason why every question of constitutionality which has been raised in this suit could not be presented and determined in such a suit.
>
> "In addition, there is special reason in the statutory provisions why that course should be followed rather than allowing the present suit. Appellant is, as we

have pointed out, a subcontractor, not a contractor with the Government. While its suit could be instituted directly only against the contractor with whom it had dealt, nevertheless it is hardly conceivable that the Government would permit the suit to go to final judgment without intervention by it, or, at the least, undertaking the responsibility for making the defense. For by Sec. 403(c)(2) it is expressly provided: 'Each contractor and subcontractor is hereby indemnified by the United States against all claims by any subcontractor on account of amounts withheld from such subcontractor pursuant to this paragraph.'

"In the face of this indemnity, the contractor becomes substantially a stakeholder as between the Government and the subcontractor, and the latter's suit against the contractor, if terminated favorably to the complainant, would obligate the Government to indemnify or reimburse the contractor for the liability thus incurred. In effect, the Government has consented to suit by the contactor in the Court of Claims on account of any liability the contractor incurs by virtue of lawful payment of the subcontractor's claim.

"Accordingly, there would seem to be no substantial reason for regarding the suit against the contractor as inherently inadequate or ineffective for the protection of any rights of appellant, including constitutional ones. In this respect the case stands identically with Coffman v. Breeze Corporation, *supra* (323 U. S. 316). If any such inadequacy exists it must be by virtue of factors extraneous to the nature of the suit itself and not present in the Coffman case . . ."

Id. page 781:

"This case is perhaps even stronger than the Waterman case for application of the Myers rule. For here the appellant is as subcontractor retaining what the

contractor complainant did not have in the Waterman case, namely, a completely adequate remedy at law against its customers, buttressed by the Government's guaranty of indemnity to the contractor for all liability incurred by him on account of withholding funds allegedly due the appellant."

The appellants proceeded in precisely the manner approved above: They brought two actions in the Superior Court against their contractors to recover moneys withheld; the Government did not intervene, but it did defend, and the present suit in the District Court and this appeal are the direct result of those two original actions in the Superior Court.

In *Aircraft & Diesel v. Hirsch,* 62 Fed. Supp. 520, the same case, *supra,* before three judge statutory court, at page 524, the court granted defendants' motion to dismiss complaint and for summary judgment, *but without prejudice "to the right of the plaintiff to maintain actions at law against its debtors and to bring suit as it may be advised in the Court of Claims."*

At page 513(2) the Court held that equity had no jurisdiction for the reason that plaintiff had complete remedies by actions at law against parties indebted to it on contracts, and quoted from *Coffman v. Breeze Corporation,* 323 U. S. 316;

At page 524, the Court further held that

"The Act of Congress involved in the Coffman Case is very similar to the Act in this case and there is

> no reason why the plaintiff has not a complete and adequate remedy by suit against its customers for any sums that may be due from them . . .;"

In *Coffman v. Breeze Corporation,* 323 U. S. 316, *supra,* at page 322, the Court held that a suit to recover a money judgment for the royalties from its customers would afford complete and adequate relief without resort to an equitable remedy, and that the constitutional validity of the Act would be a justiciable issue in the case.

In the case at Bar the appellants contend that the agents of the Government exceeded their powers and jurisdiction.

Notwithstanding the holdings of the foregoing authorities the District Court denied appellants their rights to proceed in suits against their customers in the Superior Court.

The pendency of the prior actions in the Los Angeles Superior Court between the same parties or their representatives, and in which the appellee's attorneys had appeared to defend, predicated on same cause, and growing out of the same transactions in which identical relief is sought, constitute good ground for the abatement of this suit by the Government in the District Court.

O'Reilly v. Curtis Publishing Co., 31 Fed. Supp. 364;

Hillgrove v. Wright, 146 F. 2d 621;

Joyce v. U. S., 48 Fed. Supp. 520;

Watson v. Jones, 13 Wall. 520;

U. S. v. Haytian Republic, 154 U. S. 118.

POINT THREE.

The District Court Was in Error in Holding That It Had No Jurisdiction to Render Judgment on Appellants' Cross-Claims and Offsets Numbered Second and Fourth in Their Answer.

Appellants Have the Right to Interpose Any Defenses They May Have Had to the Original Proceedings, Are Entitled to Such Affirmative Relief That May Be Pleaded and the Facts Warrant, and the Issues so Presented Are Justiciable Issues Within the Jurisdiction of the District Court to Determine.

In *United States v. The Thekla,* 266 U. S. 328, Mr. Justice Holmes, speaking for the Court, at page 339 said:

> "We do not qualify the foregoing decisions in any way, but nevertheless are of the opinion that the District Court had power to enter a decree for damages. When the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case when but for its sovereignty it would be liable does not destroy the justice of the claim against it . . ."

Continuing at page 341, the Court said:

> "The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and on the other hand the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest. As has been said in other cases the question of damage to the colliding vessel necessarily arose

and it is reasonable for the court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States. The Nuestra Senora de Regula, 108 U. S. 92; The Paquete Habana, 189 U. S. 453, 465, 466. We gather that our opinion accords with the opinion of the English Courts. The Newbattle, 10 P. D. 33. It is said that there is no statute by which the Government accepted this liability. *It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act.*

"It follows . . . that interest and costs can be recovered from the Fleet Corporation. Interest was allowed against the United States in the Neustra . . . and the Paquete . . . *supra* and interest and costs by the judgment affirmed . . . Porto Rico v. Ramos, 232 U. S. 627." (Emphasis added.)

In *United States v. Pusey* (9th Cir.), 47 F. 2d 22, this court passed on an action by the Government to recover the amount of estate tax which it had theretofore erroneously refunded. Defendants interposed a counterclaim based on the contention that the original levy was erroneous anyway. The Government contended that the counterclaim could not be set up. At page 23, the court said:

"There seems no good reason why the appellee (defendants) could not in this action present any defense they may have had to the original assessment . . ."

Page 23(2):

"It is clear that the defense made here is nothing more nor less than an assertion that the original tax

is excessive by reason of the inclusion in the assets of the real property. This defense could have been interposed in an action brought by the government to collect the original tax. Or the tax could have been paid under protest and an action brought to recover."

In *United States v. U. S. Fidelity & Guaranty Co.,* 309 U. S. 506, 511, the court held that a defendant may without statutory authority recoup on a counterclaim an amount equal to the principal claim. Citing *Bull v. United States,* 295 U. S. 247, 260, 262-263.

Monongahela Rye, 141 F. 2d 864, 869, holds *that when the United States institutes a suit it thereby submits itself to the jurisdiction of the court as to such adverse claims as have arisen out of the same transaction which gave rise to the sovereign's suit.*

In *United States v. Shaw,* 309 U. S. 495, 501, the court held that cross-claims are allowed to the amount of the Government's claim when the Government voluntarily sues.

Tillbrook v. Forrestal, 65 Fed. Supp. 1, 2(2, 3), holds that, the United States being a party to the suit, afforded the plaintiff an opportunity to urge the invalidity of the Renegotiation Act and to argue that the Act did not apply to him because he had no privity of contract with the Navy Department,

"and to present any and all defenses he may have. This he may do in that action free from the jurisdictional difficulties which beset him here because the United States is not a party to this suit, and in the Renegotiation Act did not consent to be sued. By voluntarily entering the Pittsburgh forum, the United States opened wide to Tillbrook the gate of litigation."

Page 4:

> ". . . This opportunity to assert his rights was given in the fullest measure to the plaintiff when the United States filed its action at law against him."

In *Bull v. United States,* 295 U. S. 247, Mr. Justice Roberts spoke for the court and said:

Page 260:

> "In a proceeding for the collection of estate tax, the United States through a palpable mistake took more than it was entitled to. Retention of the money was against morality and conscience. But claim for refund or credit was not presented or action instituted for restitution within the period fixed by the statute of limitations."

Subsequently the United States brought a proceeding for collection of the income tax arising out of the same transaction. The taxpayer opposed payment in full by demanding recoupment of the amount erroneously collected on the estate tax.

Continuing the Justice said (p. 260):

> "Had the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent. U. S. v. State Bank, 96 U. S. 30. *While here the money was taken through mistake without any element of fraud, the unjust retention is immoral and amounts to a*

fraud on the taxpayer's rights. What was said in the State Bank case applies with equal force to this situation. *An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. . . . In these cases* (cited) *and many others that might be cited, the rules of law applicable to individuals were applied to the United States.* A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, . . . *but it may be used by way of recoupment and credit in an action by the United States arising out of the same transaction.* (Cases cited.) In the latter case (U. S. v. Ringold, 8 Pet. 150, 163-164) this language was used: 'No direct suit can be maintained against the United States, but when an action is brought by the United States to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to Congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to Congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defense, to a suit by the United States.' If the claim for income tax deficiency had been the subject of a suit, any counter demand for recoupment of the overpayment of estate tax could have been asserted by way of defense and

credit obtained notwithstanding the statute of limitations had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action is timely." (Emphasis added.)

Further held, that the Government gave him right of credit for refund when it proceeded against him for collection of the income tax.

McVeigh v. United States, 78 U. S. 259, 267, 11 Wall. 259, 267, arose under the Act of 1862 making McVeigh an enemy rebel and under which his property was confiscated. The trial court struck out his answer. Reversed and remanded.

The court said at pages 266, 267:

"The order (of the lower court) in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization . . . It would be contrary to the first principles of the social compact and of the right administration of justice . . ."

POINT FOUR.

Appellants Alleged in Their Answer, but Were Denied the Opportunity to Prove, That Said Renegotiation Agreement of December 19, 1944 Was Null and Void for the Reason That the War Contracts Price Adjustment Board Exceeded Its Power and Jurisdiction and Thereby Bound Neither the Appellee nor the Appellants.

Said Board, the agent of the appellee, exceeded its jurisdiction in the following respects, to-wit:

1. Said Board was authorized to recapture only such excessive profits as were "received or accrued" during 1943 from such business as was renegotiable and not exempt. Section 403(a)(9), 403(a)(4)(B), 403(C)(1), and (3) and Section 403(c)(6); see Appendix A pp. 1 to 6 of the Renegotiation Act of 1943 (50 U. S. C. A. sec. 1941).

Appellants alleged but were denied the right to prove that their total renegotiable contracts and purchase orders were less than the statutory exemption of $500,000 granted by section 403(c)(6) of said Act. [R. pp. 19, 20, 22.]

By the express terms of said Act excessive profits could only be computed out of "profits received or accrued" during 1943 from renegotiable contracts in excess of said $500,000 exemption. The appellee's jurisdiction was expressly limited to such profits. Appellants were therefore exempt from all renegotiation whatsoever, and they were consequently not subject to the jurisdiction of said Board or of appellee's agents. (Sec. 403(c)(6).) All the Board's withholding orders herein are void, and the execution of said agreement constitutes no grounds for the retention of said money. The Board could neither accept nor receive

money which it was without power or authority in the first instance to recapture. It had no authority to execute said agreement.

Bancroft v. Thayer, 2 Fed. Cas. 580, 582;

Scheer v. Moody, 48 F. 2d 327, 66 F. 2d 999;

Whiteside v. U. S., 93 U. S. 247;

Hale County v. American Indemnity Co., 63 F. 2d 275;

Anthony v. County of Jasper, 101 U. S. 393, 698;

United States v. Continental Casualty Co., 29 Fed. Supp. 598, 113 F. 2d 284;

Hawkins v. United States, 96 U. S. 689, 691;

Spaulding v. Douglas Aircraft Co., 154 F. 2d 419, 422.

The Board's jurisdiction over such "profits received or accrued"—the subject matter of the Act and of said Agreement—could not be given, enlarged, or waived by the parties hereto by the mere execution of said agreement, or by any other means, nor could it be enlarged by the appellee by usurpation or assumption of powers not granted in the first instance.

Pinkerton Natl. Detective Agency v. Fidelity & Deposit Co., 138 F. 2d 469, 472(3,4) (certiorari denied 321 U. S. 766);

United States v. Johnson, 53 Fed. Supp. 167, 170(2, 4);

United States v. Mott, 37 F. 2d 850, 862(a);

Harrington v. Superior Court, 194 Cal. 185, 188;

General Broadcasting System v. Bridgeport Broadcasting System, 53 F. 2d 664, 668(6, 7);

Cox v. United States (9th Cir.), 157 F. 2d 787, 789(4, 5);

Alton Water Co. v. Illinois Commerce Commission, 279 Fed. 869;

Bachus-Brooks Co. v. Northern Pac. Co., 21 F. 2d 4 (certiorari denied 275 U. S. 562);

School of Magnetic Healing v. McAnnulty, 187 U. S. 94;

Social Security Board v. Nierotko, 327 U. S. 358.

In *Child v. Adams* (5 F. C. 613), Fed. Cases No. 2,673, page 615, the court said:

"Where a statute defines the extent of power given to one who acts ministerially, the courts can not extend it, or validate acts done without or beyond its authority."

In *Moss v. United States,* 103 F. 2d 395, at page 397, the court held:

". . . There can be no question but that courts must exercise the judicial power vested in them to determine the legal validity of administrative action, where the validity of such action is involved in questions properly before them, whether they have been granted the right of review over action of the administrative agency or not. The duty necessarily arises because of their obligations to decide cases before them according to law."

Federal Trade Commission v. Raladam Co., 283 U. S. 643, 644.

Walling v. La Belle S. S. Co., 148 F. 2d 198, 201(4, 5), holds that jurisdiction is essential to give valadity to the determination of an administrative authority, and *that without jurisdiction their acts are void, and open to collateral attack.*

The Renegotiation Act enumerated the conditions and thereby excluded all subcontractors from its application who did not come within its terms.

Gegiow v. Uhl, 239 U. S. 3, 9.

2. Said Board included in appellants' income the receipts from California Institute of Technology, which by the express terms of section 403(i)(1)(D) of said Act and of section 101(6) of the Internal Revenue Code were wholly exempt from Renegotiation. [R. p. 20.]

3. Said Board included in appellants' receipts certain "Work in Process" accounts aggregating over $45,162.50 which had not accrued at the end of said fiscal year 1943, in that appellants had no fixed and unconditional right to receive or collect thereon, and there was no fixed and ascertainable liability of the vendees, and they were in no sense a part of appellants' receipts, gross or otherwise. [R. p. 19.]

Liebes & Company v. Commissioner of Internal Revenue (9th Cir.), 90 F. 2d 932, 936, 937;

Guaranty Trust Co. v. Commissioner, 303 U. S. 493, 498;

Franklin County Distilling Co. v. Commissioner, 125 F. 2d 800, 805;

Ohmer Register Company v. Commissioner, 131 F. 2d 682, 686;

Rice, Barton & Files, Inc. v. Commissioner, 41 F. 2d 339, 340, 341;

Webb-Press Co. v. Commissioner, 3 B. T. A. 247 253; 9 B. T. A. 236;

Ehret-Day Company, 2 Tax Ct. 25;

Helvering v. Russian Finance Co., 77 F. 2d 325, 327, 328(10);

Security Mills v. Commissioner, 321 U. S. 281, 286;

Lucas v. North Texas Lumber Company, 281 U. S. 11;

D D Oil Company v. Commissioner, 147 F. 2d 936, 938;

Commissioner v. Blaine, Mackay, Lee Company, 141 F. 2d 201;

Case v. Commissioner, 103 F. 2d 283, 288;

U. S. v. Christine Oil Co., 269 Fed. 458;

Commissioner v. Union Pac. Ry. Co., 86 F. 2d 637, 639.

The foregoing authorities support appellants' contention that such work in process accounts were not and could not be income or "profits received or accrued" in such year 1943, and consequently the Board had no jurisdiction thereover.

Appellants alleged in their answer that they had no right to bill or invoice these accounts in 1943, and they therefore had no unconditional and unqualified right to recover the same. [R. pp. 19, 20.]

The Work in Process Accounts being contingent as to recovery thereon were not income or profits, and had no ascertainable market value during 1943.

Cassatt v. Commissioner, 137 F. 2d 745, 748(2, 3).

4. The Board violated section 403(a)(4)(B) of said Act when it arbitrarily denied appellants the right to deduct from their gross receipts the sum of $22,888.88 which was the amount paid out during 1943 for ordinary and necessary expenses of the business. The Board was required to allow appellants the same deductions from their gross receipts as they were allowed when computing their income tax liabilities. Appellants were required by section 23(a) of the Internal Revenue Code to deduct the same in the year that they were expended. [R. p. 19.]

Helvering v. Russian Finance Co., 77 F. 2d 324, 327, 328(10);

Chaplin v. Commissioner, 132 F. 2d 298 (9th Cir.);

Grays Harbor Motorship Corp. v. U. S., 45 F. 2d 259;

Security Mills v. Commissioner, 321 U. S. 281, 286;

Helvering v. Kansas City Amer. Ass'n. Baseball Club, 75 F. 2d 600, 602, 604;

Commissioner v. Thatcher, 75 F. 2d 900.

The rejection by said Board of the deduction of this item of $22,888.88 from appellants' gross income had the effect of adding an equal amount to their receipts.

In *Atkinson v. New Britain Machine Co.,* 154 F. 2d 895, at page 894, the court defined "excessive profits" in these words:

". . . As we understand excess profits subject to renegotiation are those profits in excess of the

legitimate costs incurred in production plus a normal profit, all of which are to be determined in accordance with designated formulas . . ."

Dixies Pine Products Co. v. Commissioner, 320 U. S. 516, 519;

Commissioner v. Blaine, Mackay Co., 141 F. 2d 201, 203(2, 3);

Burnet v. Sanford & Brooks, 282 U. S. 359, 363, 364, 365;

Gallatin Farmers Co. v. Commissioner (9th Cir.), 132 F. 2d 706, 709(4);

U. S. v. Tillinghast, 55 F. 2d 279;

American Hotels Corp. v. Commissioner, 15 F. 2d 817.

Appellee's agent, the War Contracts Price Adjustment Board, disregarded Judge Advocate General's Text No. 12-219, which provided as follows, page 403(4):

"Notwithstanding any other provisions of the Act (Renegotiation Act of 1943), all costs allowable as deductions or exclusions under Chapters 1 and 2 E of the Internal Revenue Code, excluding taxes measured by income, are allowable as costs in renegotiation." N. B. "Chapters 1 and 2 E, Internal Revenue Code, provide principally for the deduction of normal business expenses."

The Board was bound to allow the appellants the same deductions from their gross income for operating costs and expenses as they were allowed in computing their net income and liabilities.

Section 403(a)(4)(2) of said Act provided *inter alia,* that

> ". . . all items estimated to be allowable deductions under Chapters 1 and 2 E of the Internal Revenue Code (excluding taxes measured by income) shall to the extent allocable to such contracts and subcontracts (. . .) be allowed as items of cost . . ."

Renegotiation Regulations, Section 381.4;

Judge Advocate General's School Text No. 12-219, "Government Contracts and Adjustments," pages 389(d), 392(h), 395(a)1, 398(f), 403(4), 404 (*supra,* pp. 3 and 4);

Liebes & Co. v. Commissioner (9th Cir.), 90 F. 2d 932, 938;

Ohmer Register Co. v. Commissioner, 131 F. 2d 682, 686(2)(3);

Rice, Barton & Fales, Inc. v. Commissioner, 41 F. 2d 389, 341;

Webb-Press Co. v. Commissioner, 3 B. T. A. 247, 253;

Ehret-Day Co., 2 Tax Ct. 25;

Case v. Commissioner, 103 F. 2d 283, 286;

Commissioner v. Blaine, Mackay, Lee Co., 141 F. 2d 201, 203(3, 3);

Burnet v. Sanford & Brooks, 282 U. S. 359, 364;

Athens Roller Mills v. Commissioner, 136 F. 2d 125, 128.

5. The Board violated said statute when it arbitrarily deducted $39,799.04 from appellants' beginning inventory and added same to their net income. [R. p. 19.]

6. The Board violated said statute when it arbitrarily set up $38,442.26, the entire amount alleged by the Board to be in excess over the statutory exemption as excessive profits. Such application of section 403(a)(6) of said Act was repugnant to subsection 1 of Section 8 of Article I of the United States Constitution, and to the Fifth Amendment thereof, thereby taking appellants' property without due process of law and without just compensation. In determining appellants' gross receipts and their net income the Board arbitrarily drew items both from the years 1942 and 1944 transactions. This was contrary to law.

Athens Roller Mills v. Commissioner 136 F. 2d 125, 148;

Burnet v. Sanford & Brooks, 282 U. S. 359, 363-365.

7. That said Renegotiation Agreement is founded on false statements of material facts, in that it includes in appellants' income or receipts large sums of money not received or accrued, and omits necessary and proper deductions for large sums paid for labor and materials during 1943, it thereby appearing that the subject matter thereof is not supported by the truth or facts, and is not within the purview of the Act.

S. E. C. v. Chenery Corporation, 318 U. S. 80, 87;

Bancroft v. Thayer, Fed. Cases No. 835, 2 Fed. Cas. 580, 582;

Scheer v. Moody, 48 F. 2d 327, 331, 66 F. 2d 999;

Anthony v. County of Jasper, 101 U. S. 693, 698.

POINT FIVE.

The District Court Found That Appellants' Testator Did Not Plead or Offer to Prove Any Fraud or Malfeasance or Wilful Misrepresentations Inducing the Execution of Said Renegotiation Agreement. This Is Manifestly in Error as Their First Separate Affirmative Defense [R. pp. 17-22] Pleads Specifically and in Detail the Frauds, Misrepresentations and Malfeasance of Appellee's Agents Inducing Their Testator to Execute Said Instrument.

The appellee's collection and retention of moneys from appellants without right or authority in itself amounts to fraud on appellants as is expressly held in the case of *Bull v. United States,* 295 U. S. 247 at page 260, and so held even though the claim for refund, recoupment and counterclaim had not been presented or action instituted within the period fixed by the statute of limitations. The court held that when an action is brought by the United States a claim for recovery by the defendant may be used by way of recoupment and credit arising out of the same transaction.

United States v. Pusey (9th Cir.), 47 F. 2d 22, 23, *supra,* to the same effect.

Appellee obviously relies on paragraph 8 of said Renegotiation Agreement on Section 403(c)(4) of said Renegotiation Act (see Appendix A p. 3), which attempted to limit and circumscribe the inherent and constitutional powers of the court to review the action of the Board. These are plainly contrary to public policy and are repugnant to Article III of the Constitution of the United States. The United States District Court is a constitu-

tional court and may not be thus restricted or its powers abridged.

This court may, and appellants contend that it should, set aside said agreement on any grounds and for any cause that appellants establish on the trial. Said agreement may be annuled for constructive fraud, implied fraud, actual fraud, mistake of law or fact, mutual mistake, failure or absence of consideration, absence of jurisdiction by appellee's agents, absence of mutuality, and on any other legal or equitable grounds, normally within the powers of the District or this Court.

St. Joseph Stockyards v. United States, 298 U. S. 38, 52, wherein Mr. Chief Justice Hughes said:

> "Under our system there is no warrant for the view that the judicial powers of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of independent judicial judgment upon the facts where confiscation is alleged. . . ."

A leading case on the subject is that of *Crowell v. Benson,* 285 U. S. 22 (affirming 33 F. 2d 137, 45 F. 2d 66), the Chief Justice again speaking for the court at page 48(2):

> "The contention based upon the judicial power of the United States, as extended 'to all cases of admiralty and maritime jurisdiction,' (Const. Article III) presents a distinct question. In Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272, 284, this court, speaking through Mr. Justice Curtis, said: 'To avoid misconstruction upon so

grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.'"

Id. p. 56:

"The question was whether the Congress may substitute for the constitutional courts in which the judicial power of the United States is vested, an administrative agency—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use and that the Congress could completely oust the courts of all determination of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, whereby fundamental rights depends, as not infrequently they do depend upon the facts, and finality as to facts becomes in effect finality in law."

Id. p. 59. The Court held that matters disclosing a want of jurisdiction may be considered by a court of law.

Id. p. 60. In cases brought to enforce constitutional rights, the judicial power necessarily extends to the inde-

pendent determination of all questions both of fact and of law, necessary to the performance of that supreme function.

Id. p. 63. The question in the instant case was whether the commissioner acted in a case to which the statute was inapplicable.

Id. p. 64. If the court is satisfied that the commissioner had no jurisdiction that determination will deprive him of effectiveness for any purpose. Held, that the court should determine such an issue on its own record and facts elicited before it.

In re Atcheson, 284 Fed. 604, involved violation of court order made under Clayton Act, which provided that one charged with contempt could have a jury trial. P. 606(1) Held that power to punish for contempt was inherent, and not dependent on legislation. The Court then cited Sections 1 and 2 of Article III of the U. S. Constitution, referred to *Martin v. Hunter's Lessee,* 1 Wheat. 331, 4 L. Ed. 97, and said:

> "The language used by Mr. Justice Story . . . in discussing this third article, seems to me to set at rest any question that the inferior courts to be ordained and established were the creatures of Congress subject to have the rights of such courts inherent, when so ordained and established, abridged, or taken away."

Estep v. United States, 327 U. S. 114, p. 119, holding that judicial review may be required by the Constitution, and at page 126, Mr. Justice Murphy in his concurring opinion held that if the Act precluded the courts from inquiring into the validity of an inductive order it was unconstitutional.

Hall v. White, Collector I. R., 48 F. 2d 1060, and *Schlesinger v. Wisconsin,* 270 U. S. 230, hold that mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property.

53 F. 2d 210.

In *Stark v. Wickard,* 321 U. S. 288, Mr. Justice Reed, speaking for the Court said:

> ". . . When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. (N. B. 22.) This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and making their jurisdiction. Cf. U. S. v. Morgan, 307 U. S. 183, 190, 191 . . . under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."

Manley v. Georgia, 279 U. S. 1;

The St. Lawrence, 66 U. S. 522, 527.

Winston v. Georgia, 34 F. 2d 163, 167, holds that the equitable jurisdiction of a federal court is derived from the Constitution, and cannot be limited either by state statutes or Acts of Congress, but follows and grants relief in those

cases in which equitable jurisdiction obtained at the time the Constitution was adopted.

Persons v. Detroit & Canada Tunnel Co., 15 Fed. Supp. 986, 996(8, 9);

A. P. W. Paper Co. v. Riley, Commissioner, 12 Fed. Supp. 738, 741(1), 742;

Michaelson v. United States, 266 U. S. 42, 44.

United States v. Bateman, 278 Fed. 231, 232, holds as to the Fourth Amendment that the question as to an unreasonable search and seizure is a judicial question.

Utah Fuel Co. v. Coal Commission, 306 U. S. 56, 60, that jurisdiction of a District Court is to be determined by the allegations in the bill.

Crowell v. Benson, 33 F. 2d 137 (affd. 285 U. S. 22), 139, holds that the investment of judicial power came from the Constitution and not from Congress, and that courts established under Section 2 of Article III are Constitutional Courts, and same case 38 F. 2d 306, 308, holds that Congress has no power to dictate to a constitutional court what its findings shall be where jurisdiction is conferred by Article III, affd. 45 F. 2d 66.

Radio Commission v. Nelson Bros., 289 U. S. 266, holds that it is for the court to determine whether the commission acts within its power or goes beyond it.

United States v. Mott, 37 F. 2d 860 (affd. 283 U. S. 747), p. 862(3);

Garfield v. Goldsby, 211 U. S. 249.

POINT SIX.

The District Court Found That Appellants Failed to File in the Tax Court of the United States Their Petition for Redetermination of the Amount of Excessive Profits as Permitted by Section 403(e)(1) of Said Act (50 U. S. C. (App.) 1191(e)(1). Appellants Were Not Required so to Do Inasmuch as They Assail the Jurisdiction of the War Contracts Price Adjustment Board. Appellants Were Not Required in the Circumstances to Exhaust Their Administrative Remedies. They Are Entitled to Raise the Question of Jurisdiction at Any Time.

Aircraft & Diesel Corporation v. Hirsch, 331 U. S. 752, wherein at page 775, the court held that appellants' suits against its customers are not forbidden by the Renegotiation Acts, nor are they made dependent upon completion of Tax Court proceedings.

Skinner & Eddy Corporation v. United States, 249 U. S. 557, was a suit to enjoin the I. C. C. from increasing certain freight rates. Mr. Justice Brandeis, speaking for the Court at page 562, said that the defendants contended that the District Court had no jurisdiction of the subject matter because the order of the Commission could not be assailed in the courts until after a remedy had been sought under the Act to Regulate Commerce. Held, that these contentions proceeded upon a misrepresentation of plaintiff's position. Plaintiff was not seeking relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, but that plaintiff contended the Commission had exceeded its powers and that the order was therefore void. "In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even

if the plaintiff has not attempted to secure redress in a proceeding before the commission." (*I. C. C. v. Diffenbaugh,* 222 U. S. 42, 49 (cases cited). Held that the District Court had jurisdiction.

Ogden City v. Armstrong, 168 U. S. 224, 240, involved a city tax. The city contended that defendants could not recover taxes paid by them because they must proceed under the state statute. Held, that where the city council had no jurisdiction to levy the tax, the taxpayer need not proceed under the statute to recover. That where the tax was wholly void and illegal, as in this case, the statute and its remedies for errors and irregularities had no application.

A recent case is that of *Varney v. Warehime,* 145 F. 2d 238 (certiorari denied 325 U. S. 882, and rehearing denied 326 U. S. 805) 243(8) appellants insisted that action was brought prematurely because appellees had not exhausted their remedies under the procedural regulations of the Director of Food Distribution.

Held, that this is not an "ironclad rule and has no application when the defect urged goes to the jurisdiction of the administrative remedy."

Further held at page 244(9) that where the action was based on the claim that the War Food Administration had no authority to promulgate the order providing for assessment of cost of supervision against milk handlers, plaintiffs were not required to resort to regulations issued by the Administrator for correcting the irregularities, if any, before bringing the action.

Fosgate v. Kirkland, 19 Fed. Supp. 152, 156(4, 5) holds that existence of administrative remedy in AAA did not preclude citrus handlers from maintaining suit to enjoin

enforcement order issued by Secretary of Agriculture. That attacks upon the validity of the Act and the order of the Secretary were not administrative questions, but were questions of law.

Id. page 157(8, 9): That regulations vesting in the Secretary power to determine controversies were an encroachment upon the judicial branch of government as defined by Article III.

O'Donoghue v. U. S., 289 U. S. 516.

We respectfully submit that the District Court erred both in its findings of fact and conclusions of law, and that its judgment should be reversed.

R. B. Sammons,
Frank C. Shoemaker,
Attorneys for Appellants.

APPENDIX A.

The Renegotiation Act of 1943, being Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 (Public 528, 77th Congress) approved April 28, 1942; and as amended in full by Section 701(b) of the Revenue Act of 1943 (Public 235, 78th Congress), enacted February 25, 1944; 50 U. S. C. A. Section 1491.

Sec. 403(a). (4) (A) The term "excessive profits" means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive.

* * * * * * * * *

Sec. 403(a). (4) (B) The term "profits derived from contracts with the Departments and subcontracts" means the excess of the amount *received or accrued* under such contracts and subcontracts over the costs paid or incurred with respect thereto. Such costs shall be determined in accordance with the method of cost accounting regularly employed by the contractor in keeping his books, but if no such method of cost accounting has been employed, or if the method so employed does not, in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States properly reflect such costs, such costs shall be determined in accordance with such method as in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States does properly reflect such costs. Irrespective of the method employed or prescribed for determining such costs, no item of cost shall be charged to any contract with a Department or subcontract or used in any manner for the purpose of determining such cost, to the extent that in the opinion of

the Board or, upon redetermination, in the opinion of The Tax Court of the United States, such item is unreasonable or not properly chargeable to such contract or subcontract. Notwithstanding any other provisions of this section, all items estimated to be allowable as deductions and exclusions under Chapters 1 and 2 E of the Internal Revenue Code (excluding taxes measured by income) shall, to the extent allocable to such contracts and subcontracts (or, in the case of the recomputation of the amortization deduction, allocable to contracts with the Departments and subcontracts), be allowed as items of cost, but in determining the amount of excessive profits to be eliminated proper adjustment shall be made on account of the taxes so excluded, other than Federal taxes, which are attributable to the portion of the profits which are not excessive. (Emphasis added.)

* * * * * * * * *

Sec. 403(a). (9) The terms *"received or accrued"* and "paid or incurred" shall be construed according to the method of accounting employed by the contractor or subcontractor in keeping his books. (Emphasis added.)

* * * * * * * * *

Sec. 403(c). (1) Whenever, in the opinion of the Board, the amounts *received or accrued* under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. (Emphasis added.)

* * * * * * * * *

Sec. 403 (c). (3) No proceeding to determine the amount of excessive profits shall be commenced more than one year after the close of the fiscal year in which such excessive profits were *received or accrued,* or more than one year after the statement required under paragraph (5) is filed with the Board, whichever is the later, and if such proceeding is not so commenced, then upon the expiration of one year following the close of such fiscal year, or one year following the date upon which such statement is so filed, whichever is the later, all liabilities of the contractor or subcontractor for excessive profits *received or accrued* during such fiscal year shall thereupon be discharged. If an agreement or order determining the amount of excessive profits is not made within one year following the commencement of the renegotiation proceeding, then upon the expiration of such one year all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged, except that (A) if an order is made within such one year by the Secretary (or an officer or agency designated by the Secretary) pursuant to a delegation of authority under subsection (d) (4), such one-year limitation shall not apply to review of such order by the Board, and (B) such one-year period may be extended by mutual agreement. (Emphasis added.)

Sec. 403(c). (4) For the purposes of this section the Board may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may contain such terms and conditions as the Board deems advisable. Any such agreement shall be conclusive according to its

terms; and except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact, (A) such agreement shall not for the purposes of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

* * * * * * * * *

Sec. 403(c). (6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts *received or accrued* thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or subcontracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides otherwise pursuant to subsection (i), or is exempted under subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a) (5) ((B)) *do not exceed $500,000 and under subcontracts described in subsection (a) (5)* (B) do not exceed $25,000

for such fiscal year. If such fiscal year is a fractional part of twelve months, the $500,000 amount and the $25,000 amount shall be reduced to the same fractional part thereof for the purposes of this paragraph. (Emphasis added.)

* * * * * * * * *

Sec. 403(e). (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits *received or accrued* by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits *received or accrued* by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, in so far as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the

attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).

* * * * * * * * *

Sec. 403(i). (D) any contract or subcontract with an organization exempt from taxation under section 101 (6) of the Internal Revenue Code; or

APPENDIX B.

Section 3806 of the Internal Revenue Code (As Amended)

Section 3806 of the Internal Revenue Code (as Amended by Section 701 (c) of the Revenue Act of 1943), Sec. 3806. Mitigation of Effect of Renegotiation of War Contracts or Disallowance of Reimbursement.

Sec. 3806(a). Reduction for Prior Taxable Year.—

(1) Excessive Profits Eliminated for Prior Taxable Year.—In the case of a contract with the United States or any agency thereof, or any subcontract thereunder, which is made by the taxpayer, if a renegotiation is made in respect of such contract or subcontract and an amount of excessive profits *received or accrued* under such contract or subcontract for a taxable year (hereinafter referred to as "prior taxable year") is eliminated and, in a taxable year ending after December 31, 1941, the taxpayer is required to pay or repay to the United States or any agency thereof the amount of excessive profits eliminated or the amount of excessive profits eliminated is applied as an offset against other amounts due the taxpayer, the part of the contract or subcontract price which was received or was accrued for the prior taxable year shall be reduced by the amount of excessive profits eliminated. For the purposes of this section—

(A) The term "renegotiation" includes any transaction which is a renegotiation within the meaning of Section

403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.) or such section, as amended, any modification of one or more contracts with the United States or any agency thereof, and any agreement with the United States or any agency thereof in respect of one or more such contracts or subcontracts thereunder.

(B) The term "excessive profits" includes any amount which constitutes excessive profits within the meaning assigned to such term by subsection (a) of Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), as amended, any part of the contract price of a contract with the United States or any agency thereof, any part of the subcontract price of a subcontract under such a contract, and any profits derived from one or more such contracts or subcontracts. (Emphasis added.)

(C) The term "subcontract" includes any purchase order or agreement which is a subcontract within the meaning assigned to such term by subsection (a) of Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), as amended.

APPENDIX C.

Title 26 Section 101 Subchapter C (Section 101(6) of the Internal Revenue Code):

Section 101 "The following organizations shall be exempt from taxation under this Chapter:

"(6) Corporations, and any Community Chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation; . . ."